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No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1996

CITY OF SAN JUAN, TEXAS,
Petitioner

vs.

NORTH ALAMO WATER SUPPLY CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

J. W. DYER
Counsel of Record

DYER & ASSOCIATES
3700 N. 10th, Suite 101
McAllen, Texas 78501
(210) 686-6606
(210) 686-6601 Fax

Additional Counsel:
SHARON ALMAGUER

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(210) 686-6601 Fax

Additional Counsel:
SHARON ALMAGUER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... (iii)

STATEMENT OF THE CASE ..... (1)

SUMMARY OF THE ARGUMENT ..... (7)

ARGUMENT ..... (8)

CONCLUSION ..... (19)

TABLE OF AUTHORITIES

Cases	Page
Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	10
City of Madison, Miss. v. Bear Creek Water Ass'n, 816 F.2d 1057 (5th Cir. 1987)	16, 18
Glenpool Utility Services Authority v. Creek County Rural District No.2, 861 F.2d 1211 (10th Cir. 1988) cert. denied, 490 U.S. 1067 (1989)	15, 18
Illinois v. Gates, 462 U.S. 213 (1983)	10
Jennings Water, Inc. v. City of North Vernon, Ind., 682 F.Supp. 421 (S.D.Ind. 1988)	19
Moore Bayou Water Association, Inc. v. Town of Jonestown, 628 F.Supp. 1367 (N.D. Miss. 1986)	18
Singleton v. Wulff, 428 U.S. 106 (1976)	9
South Dakota v. Dole, 483 U.S. 203 (1987)	11
Thomas v. Capital Sec. Services, 836 F.2d 866 (5th Cir. 1988)	9
Webb v. Webb, 451 U.S. 493 (1981)	10

Statutes

TEX. WATER CODE ANN. § 13.001
(Vernon Supp. 1995) 2

TEX. WATER CODE ANN. § 13.247
(Vernon 1988 & Supp. 1995) 2

TEX. WATER CODE ANN. § 13.250
(Vernon 1988 & Supp. 1995) 2

TEX. WATER CODE ANN. § 13.252
(Vernon Supp. 1995) 3, 6, 7

TEX. WATER CODE ANN. § 13.253(1)
(Vernon Supp. 1995) 12

TEX. WATER CODE ANN. § 13.254
(Vernon Supp. 1995) 2, 17

TEX. WATER CODE ANN. § 13.255
(Vernon 1988 & Supp. 1995) 1, 2, 17

TEX. WATER CODE ANN. Chapter 13
(Vernon 1988 & Supp. 1995) 13

TEX. WATER CODE ANN. Chapter 26, Subchapter E
(Vernon 1988 & Supp. 1995) 12

TEX. HEALTH & SAFETY CODE Chapter 382,
Subchapter E (Vernon 1992) 13

TEX. REV. CIV. STAT. ANN. art. 1434a
(Vernon 1980) 14, 15, 17

7 U.S.C. § 1926(b) 1, 3, 4, 5, 9, 11, 13, 15, 17, 18, 19, 20

U.S. Constitution

U.S. Const., art. I, § 8, cl. 1 7

STATEMENT OF THE CASE

This case concerns the City of San Juan, Texas *("San Juan")* encroaching on North Alamo Water Supply Corporation's *("North Alamo")* certificated service area in violation of 7 U.S.C. § 1926(b) *("the Statute")* and the relief granted to North Alamo by the Federal District Court, Southern District Court of Texas (McAllen Division) *("District Court")*. The District Court permanently enjoined San Juan from pursuing applications with the Texas Natural Resources Conservation Commission *("TNRCC")* to decertify a portion of North Alamo's service area. The District Court also permanently enjoined San Juan from continuing to provide water service within North Alamo's certificated area.

San Juan raised no constitutional challenge to the Statute in District Court. San Juan first raised its constitutional arguments before the Fifth Circuit Court of Appeals *("Court of Appeals")*. As set forth more fully in this Brief, San Juan's constitutional challenge to the Statute has not been properly preserved for appeal and its arguments in favor of granting its Petition are without merit.

A. Course of Proceedings

On December 30, 1992, San Juan filed an application with the TNRCC for a water Certificate of Convenience and Necessity *("CCN")* and to decertify portions of North Alamo's water CCN No. 10553 pursuant to § 13.255 of the Texas Water Code. TEX. WATER CODE ANN. § 13.255 (Vernon 1988 & Supp. 1995). Although alleged by San Juan, it is unclear from the TNRCC record whether San Juan actually sought decertification of North Alamo's certificated area pursuant

to § 13.254 of the Texas Water Code. (San Juan's Appendix D). The TNRCC is the regulatory agency which supervises rates, operations and services of retail water utilities for the State of Texas. North Alamo holds a CCN from the TNRCC which obligates North Alamo to provide service to all areas within its CCN. The CCN, as a matter of Texas law, grants North Alamo an exclusive right and imposes a duty to provide continuous and adequate service to the CCN area. TEX. WATER CODE ANN. § 13.001(b)(1) & (2) (Vernon Supp. 1995); TEX. WATER CODE ANN. § 13.250(a) (Vernon 1988 & Supp. 1995). The areas in dispute between the parties are five subdivisions. See also, (San Juan's Appendix "A").

San Juan based its § 13.255 application on the assertion that since these subdivisions were within San Juan's corporate boundaries (San Juan having annexed these areas), it was entitled to serve the area without regard to North Alamo's rights under its CCN. San Juan maintained that Section 13.255 of the Texas Water Code automatically entitled San Juan to a CCN for the area and thus the exclusive right to provide water service to the area.

However, under Texas law, a municipality does not have an automatic right to immediately provide service in an area simply because the municipality annexes the area. The municipality is required by the Code to obtain TNRCC authorization to serve the area before service is provided. TEX. WATER CODE ANN. § 13.247(a) (Vernon Supp. 1995); TEX. WATER CODE ANN. § 13.255 (Vernon 1988 & Supp. 1995). Until such authorization is obtained, service by a municipality is prohibited by Section 13.247 of the Texas Water Code. TEX. WATER CODE ANN. § 13.247 (Vernon 1988 & Supp. 1995) (prohibits municipalities from providing service in annexed areas

within the area covered by an existing CCN without first having obtained from the commission a certificate of public convenience and necessity that includes the area to be served).

On November 8, 1993, North Alamo applied to the TNRCC for a cease and desist order against San Juan to halt San Juan's service of customers within North Alamo's CCN. Section 13.252 of the Texas Water Code grants the TNRCC authority to prevent one utility from interfering with the rights of another utility. The section provides that if one utility makes service available in an area already certificated to another utility, the TNRCC "may issue an order prohibiting the construction, extension, or provision of service or prescribing terms and conditions for locating the line, plant, or system affected or for the provision of the service." TEX. WATER CODE ANN. § 13.252 (Vernon Supp. 1995).

Also, in its request for a cease and desist order, and in its response to San Juan's application to decertify, North Alamo informed the TNRCC that the application filed by San Juan to have North Alamo decertified from serving the five subdivisions violated 7 U.S.C. § 1926(b).

On December 10, 1993, North Alamo filed a complaint in the District Court. North Alamo alleged that San Juan was violating 7 U.S.C. § 1926(b) by providing and offering to provide water service to customers in North Alamo's service area, and by pursuing its application with the TNRCC to decertify a portion of North Alamo's service area.

North Alamo's complaint requested injunctive and other relief under 7 U.S.C. § 1926(b). North Alamo sought to enjoin San Juan from directly or indirectly offering to provide or providing water service to customers in North Alamo's service area, to have the five subdivisions being served by San Juan transferred to North Alamo for service, and to prevent San Juan from pursuing its application with the TNRCC. However, North Alamo did not request any relief against the State of Texas, nor was the State of Texas a party to the action. San Juan did not raise any constitutional issues before the District Court regarding the applicability of the statute to San Juan, nor did it raise any objections to the Statute as preempting Texas law.

On February 22, 1994, by agreement of the parties, the case was heard by the U.S. Magistrate, sitting without a jury. (R. 19,25). On August 18, 1994, the District Court entered an Agreed Preliminary Injunction enjoining San Juan from serving any additional customers within North Alamo's service area. The Preliminary Injunction further ordered San Juan to contact the TNRCC and request that the TNRCC take no further action with respect to San Juan's application until the expiration of the Agreed Preliminary Injunction.

On September 30, 1994, the Court overruled numerous defensive motions previously filed by San Juan, including San Juan's Motion to Dismiss for Failure to State a Claim upon Which Relief can be Granted, San Juan's Motion to Dismiss for Failure to Join the TNRCC and the State of Texas as Indispensable Parties and San Juan's Motion to Join the Farmer's Home Administration *("FmHA")* as an Indispensable Party. (R. 272, 273).

On December 15, 1994, the District Court entered its final judgment in favor of North Alamo, which found, among other things, the actions of San Juan in providing service to the five subdivisions without North Alamo's authorization to be a violation of 7 U.S.C. § 1926(b). The Court's final judgment also enjoined San Juan from pursuing its application to the TNRCC for partial decertification of North Alamo's service area and from offering to provide or providing water service within the five subdivisions. (R.314-315). The judgment was accompanied by a memorandum opinion, prepared pursuant to Fed.R.Civ.P. 52(a). (R. 296-313).

On December 27, 1994, San Juan filed its Motion for New Trial and Motion to Alter or Amend the Judgment. (R. at 321, 325). On December 28, 1994, North Alamo filed its Motion for Leave to Amend Complaint. (R. 330). On January 27, 1995, the Court overruled San Juan's Motion for New Trial and Motion to Alter or Amend the Judgment. North Alamo's Motion for Leave to Amend Complaint was taken under advisement. (R. 344).

On May 11, 1995, the Court in a memorandum order granted, in part, North Alamo's Motion for Leave to Amend Complaint and entered an Amended Final Judgment in favor of North Alamo. (R. at 357, 359). The Amended Final Judgment granted all of the relief set forth in the December 15, 1994 judgment and additionally ordered San Juan to relinquish control of the water distribution infrastructure in the five (5) subdivisions to North Alamo. On May 24, 1995, San Juan filed its First Amended Notice of Appeal. (R. 352-359).

Pursuant to North Alamo's request, the TNRCC on May 30, 1995, issued a Cease and Desist Order commanding San Juan to stop serving customers within North Alamo's CCN area. There was a finding by the TNRCC that the conduct of San Juan in serving the five subdivision area without TNRCC approval was a clear violation of § 13.252 of the Texas Water Code. (San Juan's Appendix "D").

While the District Court's injunction prevented San Juan from asserting its decertification application, the Judgment specifically stated that it did not limit the TNRCC's ability to proceed, on its own volition, with a determination of North Alamo's ability to provide continuous and adequate service in its CCN area. (San Juan's Appendix "E"). Thus, the TNRCC's ability to review, at any time, the sufficiency of North Alamo's service within any part of its CCN area pursuant to the Texas Water Code remains unaffected by the District Court's Judgment.

The District Court's Judgment was appealed to the Court of Appeals, who affirmed it in part and remanded it in part. (San Juan's Appendix "A").

The Court of Appeals declined to consider San Juan's constitutional challenges to the Statute as applied in this case. The Court found that San Juan had failed to raise these issues in the District Court and had sought to raise these issues for the first time on appeal.

San Juan did not raise these constitutional concerns in its Motion to Join FmHA as an Indispensable Party. The brief reference to the Spending Clause in its Supplemental Memorandum in Support of the Motion is limited to San

Juan's argument that the FmHA is an indispensable party by virtue of its interest in protecting federal funds advanced under the congressional spending power. U.S. Const., art. I § 8, cl.1. San Juan's vague reference to and use of the Spending Clause in its argument supporting its Motion to Join the FmHA as a party is not the argument which San Juan now seeks to advance in this appeal. The Court of Appeals further determined that San Juan's challenge to the Statute as an impermissible preemption of State law was rendered moot by the TNRCC's Cease and Desist Order.

San Juan incorrectly states that the TNRCC's jurisdiction over the dispute between North Alamo and San Juan, as triggered by the request for a cease and desist order, was strictly limited to § 13.252 of the Water Code. While San Juan was unable to proceed with its application to decertify, nothing prevented the TNRCC from initiating a review of the adequacy of North Alamo's service to the CCN area and amending or revoking the CCN based on its review.

Moreover, the Court of Appeals was correct in holding that the preemption issue was rendered moot by the action of the TNRCC in granting the Cease and Desist Order against San Juan. As set forth above, San Juan's serving the five subdivision area without TNRCC approval was a violation of Texas law. The TNRCC took appropriate action to stop the violation. Thus, San Juan was precluded not only by the District Court's judgment, but by the TNRCC order from providing service to the affected area and from interfering with North Alamo's CCN rights.

SUMMARY OF THE ARGUMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. San Juan's Petition should be denied because San Juan never properly presented or preserved for appeal its constitutional challenge to the Statute. San Juan only raised the issue for the first time on appeal. Thus, there is no well-developed record upon which this Court could make a reasoned opinion on the constitutional issues advanced by San Juan.

II. San Juan's challenge to the Statute on the basis that it is an improper exercise of the Congress' power under the Spending Clause is irrelevant to the merits of this case since the State of Texas was not a party to this action and no remedy against the State of Texas was sought by North Alamo or granted by the District Court.

III. San Juan's challenge to the Statute on the basis that it is an improper preemption of State law or otherwise "immunizes" North Alamo from the provisions of the Texas Water Code should be rejected because nothing in the District Court's judgment impermissibly alters the administrative scheme under which the State of Texas, though the TNRCC, regulates North Alamo's water services. The judgment leaves unaffected the ability of the TNRCC, on its own volition, to regulate North Alamo.

ARGUMENT

At issue is whether the Court should grant certiorari to review the judgments of the courts below. For the reasons set forth herein, the Court should deny San Juan's Petition because the issues presented for review by San

Juan have not been properly preserved for appeal and are not pertinent to a proper determination of this cause.

I. SAN JUAN'S CONSTITUTIONAL CHALLENGE TO 7 U.S.C. § 1926(b) HAS NOT BEEN PROPERLY PRESERVED FOR APPEAL.

San Juan's constitutional challenge to 7 U.S.C. § 1926(b) was not properly preserved for appeal and North Alamo objects to a granting of San Juan's Petition on that basis.

The Court of Appeals properly declined to consider San Juan's argument that the Act represents an illegitimate exercise of Congress' power under the Spending Clause since San Juan raised the issue for the first time on appeal. The Court of Appeals adhered to its customary rule that it will not consider an issue which is not raised in the trial court and which is raised for the first time on appeal. Thomas v. Capital Sec. Services, 836 F.2d 866, 884 n.25 (5th Cir. 1988). Singleton v. Wulff, 428 U.S. 106, 120 (1976).

San Juan readily admits, throughout its Petition, that it did not raise the constitutional issues explicitly at trial, but attempts to assert that it raised the issue by a reference to the Spending Clause in a Supplemental Memorandum in Support of its Motion to Join FmHA as an Indispensable Party. However, the clause is mentioned in the Memorandum solely in the context of an argument that the FmHA has an interest in the subject of this litigation. At no time in the District Court proceedings did San Juan advance the constitutional arguments which it sought to

advance before the Court of Appeals and which it now advances before the Court.

The Court has repeatedly followed the rule that it should not review claims which are not raised and passed on in the lower courts. Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988). In determining whether to exercise jurisdiction over questions not properly raised below, the Court has focused on the practical considerations of undertaking such a review, chiefly the Court's need for a properly developed record on appeal. Webb v. Webb, 451 U.S. 493, 500 (1981); See also, Illinois v. Gates, 462 U.S. 213 (1983) ("Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion").

The Court should decline to consider the constitutional issues advanced by San Juan in this case because the issues were not addressed in the District Court and thus there is no well-developed record. Because of the dearth of facts relevant to these issues, little is available to the Court so that it can make a reasoned opinion. Also as set forth below, the constitutional arguments advanced by San Juan are not implicated by the contested facts of this case and the relief granted to North Alamo by the District Court.

II. SAN JUAN'S CHALLENGE OF THE STATUTE AS AN IMPROPER EXERCISE OF CONGRESS' POWER UNDER THE SPENDING CLAUSE IS IMPROPER BECAUSE THE ENFORCEABILITY OF 7 U.S.C. § 1926(b) AGAINST THE STATE OF TEXAS IS NOT AN ISSUE IN THIS CASE.

San Juan urges the Court to review whether the provisions of the Statute are enforceable against the State of Texas under the "conditional spending" test as adopted by the Court in the case of South Dakota v. Dole, 483 U.S. 203 (1987) and as an appropriate exercise of Congress' power under the Spending Clause. However, San Juan's argument is unwarranted as this issue is not properly before the Court. The applicability of 7 U.S.C. § 1926(b) to the State of Texas has never been raised as an issue in this case. North Alamo has not sought to restrain the State of Texas, through the TNRCC, from instituting action against or otherwise regulating North Alamo's water service.

In fact, the District Court carefully emphasized that its ruling does not "prevent the TNRCC from instituting enforcement proceedings on its own to investigate and remedy suspected inadequacies of service....or from otherwise regulating North Alamo." (Memorandum Opinion, December 15, 1994, at 15; San Juan's Appendix "E"). There is nothing raised in either the pleadings or the evidence submitted before the District Court that in any way indicates an interest by the TNRCC in San Juan's application in any capacity other than in its role to arbitrate the disputes between San Juan and North Alamo. There is no portion of the District Court's Judgment which restrains or prohibits the TNRCC from proceeding on its own volition to regulate North Alamo's water service if such

action appears to be necessary. Clearly, the police powers of the TNRCC are not affected.

Throughout its argument, San Juan attempts to equate the restriction on San Juan's ability to seek decertification of North Alamo's service area with a limitation on the State of Texas' authority, by and through the TNRCC, to regulate North Alamo. San Juan's argument is both misleading and without merit.

The issue presented in this case was limited to whether San Juan was precluded by the Act from infringing on North Alamo's certificated area while North Alamo was indebted to the FmHA. Nothing supports the theory that San Juan's application to the TNRCC to decertify North Alamo was an enforcement action to remedy inadequacies in North Alamo's retail water utility service capabilities.

The enforcement of required levels of retail water utility service is vested in the TNRCC, not with municipalities such as San Juan that are competing retail public utilities. It is the TNRCC that has the right to "order any retail public utility that is required by law to possess a certificate of public convenience and necessity to provide specified improvements in its service in a defined area if service in that area is inadequate or substantially inferior to service in a comparable area ...." TEX. WATER CODE ANN. § 13.253(1), (Vernon Supp. 1995).

Where the Texas Legislature has determined that there is a role for local governmental entities to enforce statutory and regulatory schemes entrusted to the State's agencies, the Texas Legislature has expressly so provided. See, e.g., TEX. WATER CODE ANN. Chapter 26, Subchapter E (Vernon 1988 & Supp. 1995); TEX.

HEALTH & SAFETY CODE Chapter 382, Subchapter E (Vernon 1992). However, the Texas Legislature has made no provision for enforcement by municipalities in the administration of TEX. WATER CODE ANN. Chapter 13, or the associated regulations. TEX. WATER CODE ANN. Chapter 13 (Vernon 1988 & Supp. 1995).

In short, Texas law confers no authority on cities such as San Juan to act in any supervisory or enforcement role in ensuring required levels of water utility service. Rather, that function is vested solely and exclusively with the TNRCC. Accordingly, the District Court's order enjoining San Juan from proceeding with its application to decertify North Alamo simply prohibits San Juan from competing with North Alamo for North Alamo's customers, a competition which falls squarely within the prohibition of 7 U.S.C.A. § 1926(b).

Contrary to San Juan's argument otherwise, no compelling state interest is implicated. The TNRCC's statutory enforcement rights to initiate decertification proceedings when retail public utilities fail to provide the statutorily required continuous and adequate service is simply not at issue. The District Court was careful to establish that no enforcement action initiated by the TNRCC, prospective or otherwise, is enjoined by the entry of its injunction against San Juan.

The State of Texas' legitimate interest in insuring certain levels of water utility service is in no manner impacted by the District Court's ruling that San Juan may not serve customers within the area certificated to North Alamo. The scope of the District Court's Judgment is limited solely to the actions of San Juan.

Thus, San Juan's argument that the Statute is not enforceable against the State of Texas under a "conditional spending analysis" or as a proper exercise of Congress' power under the Spending Clause is not applicable or relevant to the merits of this case.

However, even assuming the Court was to engage in a review of the Statute as is urged by San Juan, there is no doubt that the Statute is applicable to the State of Texas. The State of Texas expressly authorized North Alamo, to obtain the federal financing at issue in this case and thus has implicitly bound itself to respect the conditions accompanying such financing. See, TEX. REV. CIV. STAT. ANN. art. 1434(a) (Vernon 1980).

Article 1434(a) provides for the creation of entities, such as North Alamo, and gives authority to such water supply corporations as follows:

> **Contracts with Federal Agencies**
>
> Sec. 2. The said corporation is hereby vested with the power to negotiate and contract with any and all Federal Government agencies including, without exclusion because of enumeration, the Emergency Conservation Acts, Public Works Acts, Self-Liquidating Acts, Housing Unit Acts, Colonization Acts, Conservation Acts, Emergency Relief and Reconstruction Acts, and the Reconstruction Finance Corporation Act of January 22, 1932, Acts of the Seventy-second Congress of the United States of America, First Session, and with others, for the acquisition, construction, and/or maintenance of such

> project and improvements; to obtain money from such Federal Government agency or other sources for the purpose of financing said acquisition, and encumber the properties so acquired or constructed and the income, fees, rents, and other charges thereafter accruing to the said corporation in the operation of said properties; and to evidence the transaction by the issuance of bonds, notes, or warrants to secure the funds so obtained. But it is hereby expressly provided that the bonds, notes and/or warrants so issued shall not constitute general obligation or indebtedness of the said corporation, but shall represent solely a charge upon specifically encumbered properties and the revenue therefrom, as herein provided.

TEX. REV. CIV. STAT. ANN. art. 1434a (Vernon 1980).

In authorizing such action the State of Texas agreed to abide by the provisions of the Statute and has also bound its political subdivisions, including San Juan, to the conditions it accepts. Glenpool Utility Service Authority v. Creek County Rural District No. 2, 861 F.2d 1211 (10th Cir. 1988), cert. denied, 490 U.S. 1067 (1989).

The lower court recognized that 7 U.S.C.A. § 1926(b) "authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities...[by] protecting the territory served by such association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural

system." City of Madison, Miss. v. Bear Creek Water Ass'n., 816 F.2d 1057, 1060 (5th Cir. 1987). The Congressional prohibition against municipal encroachment is expressly designed to better secure federal financing for rural water supply systems and thereby effect a federal purpose of extending "to the community [the] benefits of a safe and adequate supply of running household water." Id.

As recognized by the court in Bear Creek, governmental entities, such as the State of Texas and San Juan, derive an economic benefit from the subsidized loans provided by the federal government:

> Equally important, it is likely that FmHA's subsidy to the rural water authority enhanced real estate values and farm prosperity in and around the city and has provided an indirect benefit to the city's overall economic conditions in exchange for the limits on its water service authority. The overall effect of this statute is therefore not so much to infringe the city's sovereign power as to foster a cooperative effort between local and federal authorities. The Tenth Amendment is surely not offended by a limited restriction imposed by the federal government to protect its subsidized loans, particularly when the benefits of those loans accrue to the municipality.

Bear Creek, 816 F.2d 1057, 1059 (5th Cir. 1987).

If the State of Texas was opposed to the provisions of the Statute, it could easily decline the infusion of federal funds to water supply corporations within its boundaries by

amending Art. 1434(a) to prohibit the acceptance of such financing by these state chartered and regulated entities.

As such, the narrow limitations which the Act imposes on San Juan in this case are not a violation of the Spending Clause as argued by San Juan. The limitations on San Juan imposed by the Statute and by the District Court's judgment are limited in scope and time and therefore do not impermissibly affect San Juan's ability to perform its governmental functions in the five subdivision area. The Statute clearly sets forth the mechanism for making the FmHA loans and the conditions that are to accompany them in furtherance of a national policy concerned with water management and rural populations. As such, the Statute is constitutional under the Spending Clause given the State of Texas' explicit authorization to water supply corporations regarding federal financing set forth in Art. 1434(a).

III. 7 U.S.C. § 1926(b) DOES NOT IMMUNIZE NORTH ALAMO FROM § 13.254 AND § 13.255 OF THE TEXAS WATER CODE.

San Juan attempts to argue to the Court that 7 U.S.C. § 1926(b) immunizes North Alamo from the provisions of § 13.254 and § 13.255 of the Texas Water Code and creates a situation where provisions of the Water Code, and the regulations thereto, have been impermissibly preempted. This argument, which is groundless, conveniently overlooks the fact that the express terms of the Statute, which limits certain actions of San Juan, does not affect the police powers of Texas. Moreover, this argument also overlooks the carefully drafted judgment of the District Court which does not impede on the TNRCC's continued ability to regulate North Alamo.

San Juan again attempts to confuse the issues in this case by equating the Statute's prohibitions against the actions of San Juan with what San Juan imagines as a limitation against the State of Texas' authority, by and through the TNRCC, to regulate North Alamo. Contrary to the arguments of San Juan, nothing in the District Court judgment limits the TNRCC's authority to bring an enforcement action against North Alamo under the provisions of the Texas Water Code, or otherwise regulate North Alamo. At no time in this action has North Alamo challenged the authority of the TNRCC to bring an enforcement action against North Alamo. In fact, the District Court's Memorandum Opinion makes clear that the TNRCC has jurisdiction to regulate North Alamo's water service in accordance with Texas law and that nothing in the ruling prevents the TNRCC from instituting enforcement proceedings on its own against North Alamo. (R.296-313). What the Statute prohibits and what the District Court has enjoined are the actions of San Juan in affirmatively seeking to decertify portions of North Alamo's certificated area; conduct which is clearly prohibited by the Statute.

All of the federal courts which have considered the provisions of 7 U.S.C. § 1926(b) have uniformly held that the Statute should be liberally interpreted so as to protect rural water associations indebted to the Farmer's Home Administration from municipal encroachment, whether by granting competing franchises or by annexing areas served by the association. Glenpool Utility Services Authority v. Creek County Rural District No.2, 861 F.2d 1211 (10th Cir.,1988), cert. denied, 490 U.S. 1067 (1989); Bear Creek at 1059 (5th Cir. 1987); Moore Bayou Water Association, Inc. v. Town of Jonestown, 628 F.Supp. 1367 (N.D. Miss. 1986)(applicability of statute not conditioned on finding that encroachment will significantly impair association's

ability to repay FmHA loan); *See also*, Jennings Water, Inc. v. City of North Vernon, Ind., 682 F.Supp. 421, 425 (S.D. Ind. 1988)(statute should be applied broadly to protect rural water associations indebted to FmHA from competition from expanding municipal systems).

Pursuant to the express terms of the Statute and the decisional authority cited above, the water services provided by North Alamo may not be limited by inclusion of a portion of the area served by North Alamo within the boundaries of San Juan or by San Juan's initiating an application for a CCN for similar service within North Alamo's area so long as North Alamo remains indebted to the Farmer's Home Administration. San Juan, through its application to the TNRCC, affirmatively attempted to obtain authorization to provide water service to portions of North Alamo's certificated area in direct violation of the Statute. The District Court's Judgment was narrowly tailored to stop the violation. Its terms applied only to the actions of San Juan.

The Court should accordingly reject the preemption issue propounded by San Juan because preemption is simply not an issue in this case. Nothing in the District Court's Judgment alters the administrative scheme under which the State of Texas, through the TNRCC, regulates North Alamo's water services. What the Statute and the District Court's judgment do prohibit is the type of predatory conduct exemplified by San Juan. (R. 296-313, 358-359). 7 U.S.C § 1926(b).

CONCLUSION

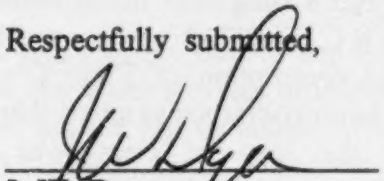
The primary issue presented in this case is the applicability of 7 U.S.C. § 1926(b) to San Juan. However,

San Juan has repeatedly attempted to divert the Court's attention from that issue by raising collateral constitutional and preemption issues which are irrelevant to the merits of this case. San Juan continues to insist that the District Court's Judgment raises issues of the constitutionality of 7 U.S.C. § 1926(b) when applied to the State of Texas and the preemption of TNRCC's regulatory authority. North Alamo continues to stress that the applicability of § 1926(b) to the State of Texas was never an issue in the case. Moreover, the District Court took great care in the drafting of its Judgment to avoid the implications about which San Juan is intent on raising.

The sole issue before the District Court and Court of Appeals was simple, clear and limited: Do the provisions of § 1926(b) prohibit San Juan from encroaching on, or engaging in activities designed to encroach on, North Alamo's service area while North Alamo is indebted to the FmHA? North Alamo has shown that the express terms of the Statute and the cases interpreting the Statute clearly prohibit the actions of San Juan as set forth in the record before the Court. Therefore, the District Court issued an appropriate Judgment. There is no need for the Court to commit its limited resources to engage in an exhaustive review of the constitutional issues presented by San Juan for the reason that there was no issue presented in the lower court which contested the applicability of § 1926(b) to the State of Texas. Moreover, these constitutional issues were raised for the first time on appeal, thereby depriving North Alamo of an opportunity to present evidence on these issues. Thus, this case is not an appropriate case upon which to determine such issues and further does not present the Court with a well developed record upon which to base a decision.

Accordingly, North Alamo respectfully requests that, for the reasons stated above, the Court deny the Petition for Writ of Certiorari filed by the City of San Juan, Texas herein.

Respectfully submitted,



J. W. Dyer
Counsel of Record for
Respondent

Dyer & Associates
Law Firm
3700 N. Tenth Street,
Suite 101
McAllen, Texas 78501
(210) 686-6606
(210) 686-6601 (Fax)

Of Counsel:

Sharon Almaguer
DYER & ASSOCIATES
3700 North 10th, Suite 101
McAllen, Texas 78501